

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-182992

DATE: May 29, 1975

MATTER OF: Dobbs Detroit Diesel, Inc.

DIGEST:

1. Bid offering two-cycle engine when IFB requires four-cycle engine is nonresponsive and properly is for rejection.
2. Bids deviating from Government's bid acceptance terms, "Default" and "Payment" contract clause provisions and IFB warranty requirement and containing descriptive literature stating that specifications are subject to change are non-responsive.
3. Where no bidder is responsive to IFB for equipment having four-cycle engine no award can be made under IFB; however, before procurement is resolicited consideration should be given to revising specifications for equipment to allow two-cycle engine to be offered, since, all factors being equal, "state of art" of two-cycle engine could be equal of four-cycle engine.

By letter of January 6, 1975, Dobbs Detroit Diesel, Inc. (Dobbs), protested against the rejection of its bid submitted under invitation for bids (IFB) 132-8818-L, issued by the United States Penitentiary, Leavenworth, Kansas.

The IFB solicited bids for a 450 KW electrical diesel engine driven generating plant. The technical specifications, at paragraph 16B.6B, required a four-cycle diesel engine. The low bid submitted by Dobbs offered a two-cycle engine and it was therefore rejected as nonresponsive by the procuring activity.

Dobbs protested to our Office that the bid should not have been rejected because the two-cycle engine will meet the performance requirements in the IFB specification. Our Office has held that, where an IFB specifies particular features for an engine, the failure of the equipment offered in a bid to conform to those features renders the bid nonresponsive and properly is for rejection. 51 Comp. Gen. 237 (1971). Therefore, the procuring activity action is sustained.

However, the other three bids submitted under the IFB are nonresponsive also and should be rejected. Our Office contacted the bidders involved and they did not disagree with the determination.

The second low bid submitted by Cummins Mid-America, Inc. (Cummins), is nonresponsive because it was accompanied by a proposal containing commercial terms and conditions at variance with the provisions of the IFB. Among the variances are statements:

- (1) that the offer is void unless countersigned by an officer of the company within 10 days after acceptance by the purchaser and in the meantime the offer is subject to change;
- (2) that delivery is subject to change by reason of factory conditions of suppliers or any cause whatever not due to the fault of the company;
- (3) that the Company may require 33-1/3% cash with the order, payment on percent of completion if manufacture is delayed, or full payment in cash before shipment; and
- (4) that there are no warranties.

These are material variances in that:

- (1) the IFB requires the bidder to agree to perform at the bid price if the offer is accepted by the Government;
- (2) the "Default" clause in standard form 32, incorporated by reference into the IFB, provides that the contractor can be excused for delay "for causes beyond the control and without the fault or negligence of the Contractor," and "If the failure to perform is caused by the default of a subcontractor, and if the default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable * * * for failure to perform, unless the supplies or services to be furnished by the

subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule;"

- (3) the "Payments" clause in standard form 32, incorporated by reference into the IFB, only provides for payment by the Government for supplies delivered and accepted; and
- (4) the IFB provides that any defects due to poor workmanship which may not have been evident at the time of delivery shall be made good at the expense of the contractor within 1 year after payment.

See Joy Manufacturing Company, 54 Comp. Gen. 237 (1974); and B-175329, June 28, 1972, holding that variances similar to the foregoing are material and render a bid nonresponsive. See also Federal Procurement Regulations (FPR) § 1-2.404-2 (1964 ed.), "Rejection of individual bids."

The IFB required bidders to submit descriptive literature with the bids in order that the offered equipment could be evaluated to ascertain whether it meets the specification. The third low bid submitted by Comet Electronics, Inc., is nonresponsive because it was accompanied by descriptive literature which contained a statement that the "Specifications May Change Without Notice." Our Office has held that a statement in descriptive literature that the specifications are subject to change provides a bidder with an option to deviate from the advertised requirements after award and is a material deviation rendering the bid nonresponsive. Big Joe Manufacturing Company, B-182063, November 14, 1974.

The fourth bid submitted by Dean Machinery Co. is nonresponsive since it stated that "The * * * generating plant meets the intent of the specification but is in no way to be construed as meeting the specification as written"; it provided that if shipment is made after July 30, 1975, the prices in effect at that time will apply; and the descriptive literature it submitted contained the legend "Material and specifications subject to change without notice." See citations, supra.

Since none of the bidders are responsive, no award can be made under the IFB. However, before the procurement is resolicited consideration should be given to revising the specifications for the equipment to allow a two-cycle engine to be offered.

In that regard, in the agency report, the following reasons were advanced for requiring a four-cycle engine:

"Four cycle engines allow more time for cooling the combustion chamber after each power stroke; therefore, the engine can operate longer without overhaul as heat is the major cause of valve and piston ring failure.

"A two cycle engine requires a blower to scavenge the burned exhaust gases. This blower absorbs engine horsepower. Under partial loads, the blower continues to pump at peak capacity, reducing the engine efficiency. The four cycle engine uses a full stroke of the piston to expel exhaust gases and no blower is required. The blower is an additional piece of equipment to be maintained.

"Two cycle engines often require premium fuel, especially for cold starts. Four cycle engines use No. 2 grade fuel oil, and therefore, can be connected to the existing fuel storage tanks used for the institution boilers which also operate on No. 2 fuel oil as a standby fuel."

Dobbs, while admitting that the two-cycle engine does require a blower to scavenge the burned exhaust gases, states that this is not the only function of the blower, it being utilized also to rush cool air through the cylinder and combustion area to aid the cooling process. According to Dobbs, the two-cycle engine has a much lower exhaust temperature and a much longer life with a longer time between overhauls than a four-cycle engine of comparable horsepower. Dobbs further states that while the blower does require extra horsepower to drive it, the four-cycle engine must use the piston to suck air through the valves for the combustion process and that this wastes more horsepower than the blower uses.

Additionally, Dobb's denies that the blower causes more maintenance and states that, if there is any extra maintenance caused by the blowers, it does not compare to the extra wear and

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movement taking place within the four-cycle engine, due to its using the piston to bring in combustion air. Dobbs also denies that the two-cycle engine needs premium fuel. Further, Dobbs points out that every down stroke of the piston on a two-cycle engine is a power stroke, whereas every other stroke is a power stroke on a four-cycle engine and that this means the two-cycle engine has quicker acceleration, faster start and faster response to a load than does a comparable four-stroke engine.

We had an engineer in our Office review the conflicting contentions. The engineer concluded that the "state of the art" of two-cycle engines has advanced notably in the last 10 years and that, all factors being equal, the two-cycle engine could very well be equal to the four-cycle engine. In support of this view, the engineer has indicated that, generally speaking, the time between overhauls, general maintenance requirements, and type of fuel required is comparable between the two and four-cycle engines. While it is agreed that the two-cycle engine does require a blower to scavenge the burned exhaust gases, the engineer has advised that the extra power used by the blower, in light of other considerations, is a minimal factor at most and should not warrant serious consideration.

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Deputy Comptroller General
of the United States